Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*,

v.

FRED BERRE DOUGLAS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI FROM DENIAL OF MANDAMUS

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
M. HOWARD WAYNE
Supervising Deputy Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
PAT ZAHAROPOULOS
Deputy Attorney General
Counsel of Record
110 West A St., Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2209
Counsel for Petitioner

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QUESTION PRESENTED

1. Does the failure to litigate or decide the allegations of a habeas corpus petition challenging a state capital judgment for over four years after issuing a stay of execution, violate principles of federal habeas corpus review of state criminal judgments?

2. Is a district court's duty promptly to decide a habeas corpus petition violated by the failure to litigate or decide the merits of the allegations of the petition challenging a capital judgment over four years after issuing a stay of execution?

3. Does the state's interest in the administration of criminal justice and finality of judgments dictate that the district court should issue an opinion in a capital case within 120 days of the filing of the answer?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. _____

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*,

v.

FRED BERRE DOUGLAS, *Respondent*.

Petitioners pray that pursuant to its appellate jurisdiction and the All Writs Act, (section 1651, subdivision (a) of Title 28 of the United States Code), certiorari be granted and a writ issue to compel the United States District Court to litigate and decide the habeas corpus petition filed on November 16, 1992, amended on January 19, 1994, and answered on April 18, 1994, in Douglas v. Calderon, CV 91-3055 RSWL. Stay of execution was issued on June 13, 1991, and the habeas corpus allegations have yet to be litigated or decided.

OPINION OR JUDGMENT BELOW

On May 10, 1995, the district court denied Petitioner's motion to decide the Petition for Writ of Habeas Corpus. Appendix A. On August 3, 1995, the United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Writ of Mandate to the district Court. Appendix B.

A federal stay has been in effect since June 13, 1991.

STATEMENT OF JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a) and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

The district court has jurisdiction in Douglas' petition for writ of habeas corpus under sections 2241, subdivision (a) and 2254 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Fred Berre Douglas is an inmate in California State Prison sentenced to be executed for the 1981 murders of two teenaged girls. After Douglas' direct appeal was rejected by the California Supreme Court (People v. Douglas, 50 Cal. 3d 486 (1990)) and the Petition for Writ of Certiorari was denied by this Court (Douglas v. California, 498 U.S. 1110 (1991)), Douglas initiated federal habeas corpus proceedings by requesting a stay of execution.

On June 13, 1991, a stay of execution was issued by the United States District Court for the Central District of California in Case No. CV-91-3055 RSWL. Douglas first sought appointment of counsel on June 6, 1991, and attorneys were appointed for him on November 8, 1991. His first petition for habeas corpus, filed on November 16, 1992, contained a mixture of exhausted and unexhausted claims. The district court

granted Douglas the opportunity to return to the state court to exhaust all his claims.

Douglas filed a state habeas petition (his second) with the California Supreme Court, which was denied on the merits on October 13, 1993. He filed his amended petition in the district court on January 19, 1994, and petitioner filed an answer on April 18, 1994. Douglas filed a traverse followed by a motion for evidentiary hearing which was taken under submission on November 14, 1994. No decision has issued. Petitioner filed a motion to decide the petition for writ of habeas corpus which was denied on May 10, 1995. Appendix A.

Our petition for writ of mandate in the Ninth Circuit Court of Appeals was denied on August 3, 1995, after the court ordered and received an opposition from the Real Party in Interest. Appendix B.

SUMMARY OF ARGUMENT

The district court's unreasonable delay in litigating or deciding douglas' petition for habeas corpus in this capital case violates the due process rights of California and the state's ability to timely enforce its laws

The district court issued Douglas a stay on June 13, 1991. While there is no deadline for decision by the district court in habeas corpus, the delay in this case is per se unreasonable under In re Blodgett, 502 U.S. ___, 112 S. Ct. 674, 676, 116 L. Ed. 2d 669 (1992). The state is deprived of its sovereign power to enforce its criminal laws by unreasonable delay in deciding this and other capital cases.

A federal stay of execution issued in this case over four years ago and remains in effect. The petition was filed, amended after exhaustion and answered. A request for an evidentiary hearing was made and opposed and remains now nine months later undecided.

Over four years after the stay -- the allegations of the petition remain unlitigated and undecided.

ARGUMENT

BECAUSE THE DISTRICT COURT HAS GRANTED A STAY OF EXECUTION IN THIS CAPITAL CASE, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO INSURE THE PROMPT RESOLUTION OF THE CASE, WHICH HAS NOT BEEN FULFILLED

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court, as a federal court, may issue a Writ of Mandamus when it is "necessary or appropriate in aid of their respective jurisdictions." Will v. Calvert Fire Insurance Company, 437 U.S. 655, 661 (1978) plurality opinion; Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943). This Court has long recognized this authority, and stated when it should be used.

> Application for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having heard the case,

> refuses to render judgment or enter a decree in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872).

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84-85 (1970); La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957).

Recognizing these principles, the Eighth Circuit recently issued a writ of mandamus requiring a district court to decide two long delayed capital cases within 180 days of the order. Hopkins v. Maryland, 59 F.3d 102 (8th Cir. 1995) 102. This Court has said that issuance of a writ of mandamus will be appropriate in exceptional cases involving stay orders. Gulfstream Aerospace Corp. v. Mayacamas Corp. 485 U.S. 271, 288, fn. 13 (1988). This case presents exceptional circumstances because it has not received priority.

This Court has advised federal courts to resolve collateral attacks on capital cases promptly with due consideration of the issues.

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, 502 U.S. ___, 112 S. Ct. 674, 676, 116 L. Ed. 2d 669 (1992), emphasis added. Petitioner maintains that the district court has abused its discretion in this case by not following the dictates of Blodgett and promptly resolving the petition before it.

While the district court correctly pointed out in its May 10, 1995, order that it must review over 4,000 pages of trial transcript, a 170 page amended petition, a 246 page answer, totalling 357 pages with exhibits, and a 100 page traverse (Appendix A, at 3), the stay has been pending for over four years. The record of the

trial was filed with the district court on November 1, 1991, so that the district judge has had ample time to review it. The district court has undoubtedly entertained and resolved numerous other matters of lesser import from the standpoint of the interests of the parties and state -- in the last four years. (The United States defeated the Axis powers in less time.)

Habeas corpus "is a speedy remedy, entitled by statute to special preferential consideration to ensure expeditious hearing and determination." Van Buskirk v. Wilkinson, 216 F.2d 735, 737-738 (9th Cir. 1954).

Recently, the Ninth Circuit Court of Appeals stated its policy not to tolerate "extraordinary delay." Ironically, it allowed a state prisoner to bring his habeas corpus petition challenging the constitutionality of his conviction despite the fact that the state had not yet made a final ruling on his penalty phase and sentence. Phillips v. Vasquez, 56 F.3d 1030, 1035-1038 (9th Cir.

1995). Yet the Ninth Circuit denied the Warden's petition for writ of mandate in this case. Appendix B.

Here, Douglas was sentenced to death on April 5, 1985, for the murders of two teenagers. His conviction and sentence were affirmed by the California Supreme Court on April 2, 1990. People v. Douglas, 50 Cal. 3d 468, 268 Cal. Rptr. 126, 788 P.2d 640 (1990). His petition for certiorari was denied.[1/] Douglas v. California, 498 U.S. 1110 (1991).

On June 13, 1991, the district court issued a stay of execution and has yet to decide the petition for habeas corpus which Douglas filed on November 16, 1992, and amended on January 19, 1994. The delay in deciding the petition, to say nothing of the delay in ruling on Douglas' motion for an evidentiary hearing,

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1. A second petition challenging the constitutionality of California Penal Code section 190.3 was also denied. Douglas v. Calderon, ___ U.S. ___, 114 S. Ct. 2781 (1994). See Tuilaepa v. California, 512 U.S.___, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); Proctor v. California, 512 U.S. ___, 114 S. Ct. 679, 126 L. Ed. 2d 646 (1994).

violates this Court's decision in Blodgett and carries with it the substantial likelihood that witnesses will die or disappear, memories will fade and evidence will become unavailable to defend this valid, final judgment of death. Phillips v. Vasquez, 56 F.3d at 1036.

A. This Case Meets the Guidelines Necessary for Issuance of Extraordinary Writ

In In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297 (9th Cir. 1982), the Ninth Circuit Court of Appeals explained in detail the guidelines it would use to determine whether a mandamus petition was an appropriate remedy in a particular case. The guidelines described include: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief they desire; and (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal. 688 F.2d at 1301, citing Bauman v. United States District Court, 557 F.2d 650, 654-655 (9th Cir. 1977), see also, Will v.

Calvert Fire Ins. Co. 437 U.S. at 661-662. The Ninth Circuit Court of Appeals refers to those five guides as the Bauman factors. In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d at 1301. In In re Cement Antitrust, the Ninth Circuit Court of Appeals noted that related considerations included whether the injury alleged by the petition was not correctable on appeal; whether the petition presents an issue that would repeatedly evade appellate review; or whether "there are other compelling factors relating to the efficient and orderly administration of the district courts." 668 F.2d at 1301. Application of these factors is set forth in section B, below. Petitioner maintains that the district court has abused its discretion in this case by not following the dictates of Blodgett and promptly resolving the matters before it.

B. Mandate is the Only Available Means to Insure the Prompt Resolution of the Instant Case

A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-662, quoting Insurance Company v. Comstock, 83 U.S. (16 Wall.) at 270; Ex Parte Newman 81 U.S. (14 Wall.) at 165.

The State of California has no other available remedy to ensure a prompt resolution of this case except by relief through a Writ of Mandamus.

This Court has recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

> None of the reasons offered in the response dispels our concern that the State of

> Washington had sustained severe prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [McCleskey v. Zant] when discussing the importance of finality in the context of federal habeas corpus proceedings

In re Blodgett, 112 S. Ct. at 676 (citation omitted, emphasis added). As with the State of Washington in Blodgett, California suffers an affront to its sovereign power when a federal court stays a state judgment and then refrains or delays ruling on a Petition for Writ of Habeas Corpus.

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them

McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), emphasis added. The diminution of sovereignty is even greater for the State of California in this case because the federal district court has prevented the state from enforcing its criminal laws against Douglas

for over four years without adjudicating or deciding his allegations.

The State seeks a prompt decision of this matter.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the objectiveness of underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 113 L. Ed. 2d at 543, 111 S. Ct. at 1469, quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Har. L. Rev. at 452-453 (1963).

A court immobilized in its search for justice provides none. The district court's duty is not to achieve absolute certainty on the issues before it, but simply, after due consideration, to decide them.

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), emphasis added. Ever-delayed justice is no justice at all.

Condemned prisoners profit from delays and stays, prompting some courts to prohibit granting further stays by lower courts under certain circumstances. Steffen v. Tate, 39 F.3d 622, 626-628 and fn. 2 at 627 (6th Cir. 1994).

The condemned prisoner's goal of delay through habeas corpus litigation is expressly discussed in Steffen. Steffen, a state prisoner with no federal habeas corpus petition on file, obtained a stay from a district court. In an opinion reversing the decision and dissolving the stay, the Circuit Court of Appeals wrote:

> It would be a mockery of the limited role of federal courts in state criminal proceedings to allow federal courts simply to shut down the

> state capital-punishment process on the pretense that a habeas proceeding is 'pending.' There is no doubt that, so long as word processor and photocopier hold out, petitioners can continue to have proceedings pending in state court and to generate issues that have not been exhausted. The exhaustion requirement for federal habeas does not mean that petitioners can simply choose never to file a habeas so long as there is some additional contention that could be raised in state court. Thus, we hold that McFarland decision does not create a generalized repeal of the requirement that a habeas petition must be pending for a federal court to stay an execution. Rather, it holds only that in a limited situation where a truly unrepresented prisoner requires representation in order to prepare a competent habeas petition, a federal court is not devoid of jurisdiction to issue such an order in aid of that particular end.

Steffen, emphasis added at pp. 627-628; In re Parker, 49 F.3d 204, 206-213 (6th Cir. 1995). Just as it is "almost always in the interest of a death-sentenced prisoner to delay filing that petition as long as possible" (Steffen, at 625; Parker, at 211-212), delays in deciding the petition, once it is filed, benefit the prisoner. The state must, therefore, move for decision and seek a writ if that

motion is not successful. Stewart v. Peters, 878 F.Supp. 1139, fn. 2 at 1141-1142 (N.D.Ill. 1995).

California continues to suffer prejudice based on the district court's failure to act. Therefore, the state's right to a writ is "clear and indisputable." Mallard, 109 S. Ct. at 1822. The district court's explanation for the delay -- voluminous records -- is not persuasive.[2/] Ex. 1 at 3. At a minimum, the district court is continuing to violate the duty recognized by this Court in Blodgett. Furthermore, the problem of delays in capital habeas is an issue of great concern to the states that is repeated with such regularity in the Ninth Circuit and Central

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2. Douglas has a short trial record for a capital case and that record has been on file with the district court since November 1, 1991.

Any excuse based on current case load is unacceptable, and has been repeatedly rejected as a matter of law. McClellen v. Young, 421 F.2d at 691 (excessive volume of pending habeas petitions insufficient ground to justify delay in deciding them); see also Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978) (busy court docket cannot justify 14-month delay in processing claim from date of remand). Any other result would render the holding of In re Blodgett a nullity.

District that public policy demands direction from this Court even if this case is decided after filing of this petition.

C. California Requests That This Court Exercise Its Supervisorial Authority and Establish a 120-Day Time Limit for Ruling on Habeas Corpus Petitions From Filing of the Answer

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a writ of mandamus when it shows that the court has abused its discretion. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. at 84-85; La Buy v. Howes Leather Co., 352 U.S. at 257. In Blodgett, this Court stated that the federal courts had a duty in capital cases to "take all steps necessary to ensure a prompt resolution of the matter." 116 L. Ed. 2d at 676, 112 S. Ct. at 676, emphasis added. The Ninth Circuit Court of Appeals has taken the extreme step of declaring California's appellate process "ineffective" within the meaning of

section 2254(b), due to delay. Phillips v. Vasquez, 56 F.3d at 1036. Yet it denies writ of mandate to the states prevent undue delay in federal habeas.[3] See Appendix B; Lewis v. United States District Court of Arizona, 9th Circuit Case No. 93-70578 attached as Appendix C. Clearly, the district court has failed to follow the Blodgett mandate in this case.

No procedures or rules are in place to ensure compliance with Blodgett or Phillips. To redress this lack of guidance, respondent requests this Court order the district courts to rule within a specified time on a petition of habeas corpus in all pending capital cases once the briefing is complete.[4] The failure to decide

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3. By contrast, the Eight Circuit ordered a district court to decide the merits of two pending capital habeas petitions within 180 days after its order. Hopkins v. Maryland, 59 F.3d 102, 102.

4. A period of 120 days from the filing of the answer may be a reasonable guideline for decision. The local rules of the United States District Court for the Southern District of California contemplate a 120 day temporary stay "to allow newly appointed counsel to prepare and file the petition." West, Cal. Rules of Court, Federal, p. 675, LR 9.3b8c, habeas corpus and motions under § 2255.

a case within that time constraint would constitute a prima facie showing that the court has not complied with the Blodgett mandate. This direction would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case and continuously in each individual case. Long delays in deciding capital cases are recurring in the district courts within the Ninth Circuit. See Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), remanded Lewis v. Jeffers, 497 U.S. 764 (1990); Jeffers v. Lewis, 5 F.3d 1199 (9th Cir. 1992). Howard v. Calderon, CV 88-7240 WJR, stay issued 12/2/88; Thompson, T. v. Calderon, CV 89-3630 RG, stay issued 6/20/89, decision issued 5/30/95; Melton v. Calderon, CV 89-4182-RMT, stay issued 7/14/89; Brown v. Calderon, CV 90-2815-AWT, stay issued 6/1/90;

American Bar Association recommendations suggest a one year statute of limitations (beginning "upon completion of the state direct review process") for filing all post-conviction applications in capital work. It points out the United States Supreme Court resolves Petitions for Certiorari in 90 days if filed during the regular term and 120 days if filed during the summer. 40 Am. Univ. Law Rev. 1, Recommendation 13 (1990).

Silva v. Calderon, CV 90-3311-DT, stay issued 6/26/90; Robertson v. Vasquez, CV 90-4050-CDM, stay issued 9/7/90; and Thompson, R. v. Calderon, CV 90-6605-JMI, stay issued 12/5/90. Compare Hopkins v. Maryland, 59 F.3d at 102.

Long delays in decisions of capital habeas corpus appeals are also a recurring problem for prosecutors. Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994); Wade v. Calderon, 29 F.3d 1302 (9th Cir. 1994).

The Blodgett mandate is clear -- federal courts must establish procedures and practices to ensure "prompt" resolution of habeas corpus petitions in capital cases. The district court below has failed to do so. Setting a time limit for ruling on a petition of habeas corpus would allow some flexibility, while providing assurances to the states that the current practice of

allowing capital cases to languish in the district courts for years before ruling will not be condoned or permitted.

This Court has long recognized the overriding policy of preventing federal interference with the state's fundamental interest in the administration of its own criminal justice system. Coleman v. Thompson, 501 U.S. 722 (1991); McCleskey v. Zant, 111 S. Ct. 1454; Teague v. Lane, 489 U.S. 288, 309 (1989); Francis v. Henderson, 425 U.S. 536, 539 (1976).

California believes that establishing a time limit for the district courts to rule on pending capital habeas corpus petitions is not only warranted, but absolutely essential to the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of California respectfully requests that the court grant a writ of certiorari to adopt time limits for the district court to render a decision and reverse and remand the Ninth Circuit's denial of mandamus.

Dated: September 6, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

WILLIAM M. WOOD
Supervising Deputy Attorney General

M. HOWARD WAYNE
Supervising Deputy Attorney General

Pat Zaharopoulos

PAT ZAHAROPOULOS
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

DANIEL E. LUNGREN
Attorney General of
the State of California
PAT ZAHAROPOULOS,
Supervising Deputy Attorney General

110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

No: _____
October Term, 1995

ARTHUR CALDERON, Warden,
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Petitioners,

v.

FRED BERRE DOUGLAS,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI WITH APPENDIX as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Mark E. Overland
Attorney at Law
1717 Fourth Street, 3rd Floor
Santa Monica, CA 90401

Hon. Ronald S.W. Lew
United States District Court
312 North Spring Street. Ste. G-8
Los Angeles, CA 90012-4793

Mark A. Borenstein
Leslie E. Wallis
Attorneys at Law
355 South Grand Ave., 40th Floor
Los Angeles, CA 90071-3101

United States Court of Appeals
Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939
Justices Norris, Noonan & O'Scannlain

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 7th day of September 1995.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 7th, 1995.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 7th day of September.

Christine J. Kaul
Notary Public in and for said County and State

PWR1 CHRISTINE J. KAUL Comm. # 1034176 NOTARY PUBLIC - CALIFORNIA San Diego County My Comm. Expires July 31, 1998 PWR1

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*,

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FRED BERRE DOUGLAS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI FROM DENIAL OF MANDAMUS

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Senior Assistant Attorney General
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Supervising Deputy Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
PAT ZAHAROPOULOS
Deputy Attorney General
Counsel of Record
110 West A St., Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2209
Counsel for Petitioner

43 pp

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed 5/10/95

FRED BERRE DOUGLAS,	) No. CV -91) 3055 RSWL) DEATH PENALTY
Petitioner,	) CASE
v.	)
ARTHUR CALDERON, Warden of San Quentin State Prison,	) ORDER DENYING) RESPONDENT'S) MOTION TO) DECIDE PETITION) FOR WRIT OF) HABEAS CORPUS
Respondent.	)

On April 19, 1995, respondent filed a motion requesting that the Court rule immediately on petitioner's pending petition for writ of habeas corpus. Respondent complains that there has been an unreasonable 4-year delay in this case. The motion contains an incomplete recitation of the procedural history in this case; therefore, the Court sets out the chronology of the federal case:

Petitioner first sought appointment of counsel on June 6, 1991.

The Court appointed counsel on November 8, 1991.

The Court granted a 120-day stay and a 180-day stay, but then granted only a 60-day stay even though a 180-day stay was sought.

Petitioner filed his habeas petition on November 16, 1992.

Respondent refused to waive exhaustion and on December 23, 1992 moved for either a dismissal of the petition or to hold the federal proceedings in abeyance pending exhaustion.

After receiving briefing on the exhaustion issue, the Court on February 12, 1993 found the petition contained unexhausted claims and granted petitioner 60 days to file a petition in state court.

The Court granted petitioner two 30-day extensions, before denying a third request to extend the filing date in state court.

Petitioner filed a state habeas petition on June 21, 1993.

After receiving informal briefing, the California Supreme Court denied the petition on the merits on October 14, 1993;

On November 18, 1993, at the request of the Court, the parties stipulated to a briefing schedule for the amended petition, answer, and traverse.

On January 7, 1994, 3 days before the amended petition was due, the Court denied petitioner's request for a stay of proceedings pending the filing of a petition for certiorari regarding the denial of the state habeas petition.

Petitioner filed his amended petition on January 19, 1994;

On March 4, 1994, respondent requested and received a 30-day extension for filing the answer. The Court also gave petitioner an additional 30 days to file his traverse.

Respondent filed the answer on April 18, 1994.

On June 16, 1994, the Court denied petitioner's request for a 60-day extension of time to file the traverse.

Petitioner filed a traverse on June 24, 1994;

On July 29, 1994, the Court set a briefing schedule for petitioner's motion for an evidentiary hearing;[1]

Petitioner filed a motion for an evidentiary hearing on October 3, 1994.

Respondent filed an opposition on October 31, 1994;

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1. When setting the briefing schedule, the Court was mindful that it had just granted petitioner some funds to investigate claims after denying two previous applications for funds.

Petitioner filed a reply on November 14, 1994.

The motion for an evidentiary hearing has been under submission since that time.

As can be seen in this chronology, the case has moved along at a steady rate since the beginning. Indeed, the Court denied at least four requests by petitioner to extend time to file documents. Respondent's claim of a 4-year delay in this case is misleading and his characterization of the delay as "unreasonable" is unsupported by the facts.

This Court does not condone delay in this case. On the other hand, the Court has a responsibility to give both parties a "full and fair consideration to all issues presented in the case." In re Blodgett, 502 U.S. 236, 240 (1992). To give both parties a fair ruling on the evidentiary hearing motion, the Court must review the over 4,000 pages of trial transcripts, as well as the voluminous pleadings filed in

this Court.[2] When the Court has completed its review, it will issue a ruling on the motion.

Before concluding, the Court notes that responding to a factually inaccurate and legally insubstantial motion such as this takes scarce judicial resources away from other more pressing matters and does nothing to further the litigation.[3] Respondent's motion for an immediate ruling on the petition itself is DENIED.

IT IS SO ORDERED.

Dated: May 9, 1995

Ronald S.W. Lew
United States District Judge

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2. The Court notes that the pleadings on the motion consume 140 pages. In addition, the amended petition is 170 pages, the answer is 357 pages (including exhibits), and the traverse is another 100 pages.

3. The court further notes that respondent spent a large portion of the motion arguing why an evidentiary hearing was unnecessary in light of a recent Ninth Circuit decision. Such argument would be more properly made in a supplemental opposition rather than in a motion to rule on the entirety of the petition.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed August 3, 1995

ARTHUR CALDERON, Warden,	No. 95-70497
Petitioner,	DC No. CV 91-03055 RSWL
vs.	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	ORDER
Respondent,	
FRED BERRE DOUGLAS,	
Real Party in Interest.	

Before: NORRIS, NOONAN AND O'SCANNLAIN, Circuit Judges

Petitioner's Petition for Writ of

Mandamus is DENIED

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93 - 70578

SAMUEL L. LEWIS, Director,
Arizona Department of
Corrections, GRANT WOODS,
Arizona Attorney General,

Petitioners,

vs.

UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF ARIZONA,

Respondent,

MICHAEL EMERSON
CORRELL, JOSE ROBERTO
VILLAFUERTE, ANTHONY
LEE CHANEY, JIMMY ALAN
ARNETT, JOSE JESUS
CEJA,

Real Parties in Interest.

ON PETITION FOR WRIT
OF MANDAMUS TO THE
UNITED STATES COURT
FOR THE DISTRICT OF
ARIZONA

CIV-87-1471-PHX-SMM
CIV-91-0729-PHX-SMM
CIV-85-2266-PHX-RCB
CIV-83-2157-PHX-SMM
CIV-84-2322-PHX-RCB

PETITION FOR WRIT OF MANDAMUS

Grant Woods
Attorney General
Paul J. McMurdie
Chief Counsel
Criminal Appeals Section

STATEMENT OF THE FACTS

Correll v. Lewis, No. CIV 87-1471-PHX-SMM

Michael Emerson Correll is an inmate in the Arizon State Prison sentenced to be executed. On September 15, 1987, Correll flied a Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On September 18, 1987, the District Court of Arizona issued an order staying the scheduled execution of Correll. (Exhibit C.) On October 2, 1987, the District Court appointed two attorneys to represent Correll in the habeas corpus proceeding. (Exhibit D.) Later the court granted Correll's request to amend the petition. (Exhibit E.) On February 24, 1988, Correll flied an Amended Petition for Writ of Habeas Corpus. (Exhibit F.)

On April 10, 1989,[4] the State filed a motion to dismiss the amended petition because Correll had

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4. The delay in the filing of a response to Correll's amended petition was due to oversight in the District Court Clerk's Office in that it failed to serve the state with copies of any of the District Court's orders. (Exhibit G.)

not exhausted state court remedies. (Exhibit H.) On June 5, 1989, the District Court denied the State's motion to dismiss, and ordered a response to the petition. (Exhibit I.) After this Court issued its opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the District Court stayed all proceedings related to Correll's death sentence, but ordered the proceedings related to the remainder of the claims to continue. (Exhibit I.)

On September 7, 1989, the State filed two separate motions for summary judgment. (Exhibit K.) On November 15, 1989, Correll filed a response to the State's Motions for Summary Judgment, and the State replied on December 4, 1989. On February 10, 1990, Correll filed another motion to amend the petition raising two additional claims. (Exhibit L.) The State opposed Correll's request. (Exhibit M.) On March 14, 1990, the District Court granted Correll's request to amend the petition. (Exhibit N.) On April 2, 1990,

the State filed a summary judgment motion on the newly added claims. (Exhibit O.) The District Court took no action on the State's motions.

In 1991, when the District Court learned that the State was preparing a mandamus petition against the Court for failing to act on the summary judgment motions, the court ordered a status conference on the petition. (Exhibit P.) On October 4, 1991, the District Court vacated the State's summary judgment motions, and allowed Correll to amend his petition one more time. (Exhibit Q.)

On December 6, 1991, Correll filed his Third Amended Petition for Writ of Habeas Corpus. (Exhibit R.) On February 14, 1992, the State again filed a Motion for Summary Judgment. (Exhibit S.) On May 15, 1992, Correll filed a response to the State's summary judgment motion, and the State replied on May 29, 1992. In conjunction with his response to the motion for summary judgment, Correll

moved to expand the record with material never presented to the state courts. (Exhibit T.) The State objected to the motion. (Exhibit U.) On June 19, 1992, the District Court heard argument on the respective motions and stated, "The court will enter a formal written order in this matter." (Exhibit V.)

After waiting over 9 months for the Court's written order, the State filed a request for ruling. (Exhibit W.) The State pointed out the extreme length of time that had passed since Correll filed his original petition with the court. (Exhibit W at 2.) The State asked, pursuant to *In re Blodgett*, ___ U.S. ___, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992), that the court "exercise all due diligence and render its opinion forthwith." The District Court has not responded to the State's request for ruling, nor has it ruled on the State's Motion for Summary Judgment.

Villafuerte v. Lewis, No. CIV-91-0729-PHX-SMM.

Jose Roberto Villafuerte is an inmate in the Arizona State Prison sentenced to be executed. On May 9, 1991, Villafuerte filed a Preliminary Petition for Writ of Habeas Corpus and an Application for Stay of Execution in the District Court. (Exhibit A.) On May 14, 1991, the District Court issued a stay of the execution and appointed counsel for Villafuerte. (Exhibit B.) On July 19, 1991, Villafuerte filed an amended petition. (Exhibit C.) On August 26, 1991, Respondents filed a motion for summary judgment on all issues in the amended petition. (Exhibit D.) Villafuente filed a response and Respondents filed a reply. On March 16, 1992, the District Court heard oral argument on the motion for summary judment. As of this date, the District Court has not ruled on Respondent's motion for summary judgment although more than 15 months have passed since oral argument on the motion.

Chaney v. Lewis, No. CIV-85-2266-PHX-RCB

The Arizona Supreme Court affirmed Chaney's conviction and death sentence in *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1264 (1984). Chaney filed a federal habeas corpus petition on October 8, 1985. (Exh. A and B.) The District Court denied the petition, and Chaney appealed. This Court remanded the case on November 28, 1986. *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), cert. den. 481 U.S. 1023 (1987). After remand, the State requested that the District Court set a briefing schedule. (Exhibit C.) The District Court granted the State's request, and the State filed its answer on July 17, 1987. (Exhibits D. and E.) The District Court stayed the proceedings on January 13, 1989, pending a mandate in *Adamson v. Ricketts*. (Exhibit A.) After the United States Supreme Court issued *Walton v. Arizona*,[5] the State requested a ruling on the merits on March 7, 1991.

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5. 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

(Exhibit A.) In October 1991, the State requested that the District Court lift its stay. (*Id.*)

Chaney then changed counsel. (Exhibit A.) The District Court ordered Chaney's new counsel to file an amended petition by February 14, 1992. (Exhibit F.) In April 1992, the District Court advised Chaney's counsel that further continuances for the amended petition would not be granted. (Exhibit H.) Chaney then requested that his federal petition be held in abeyance so that he could return to the state court to pursue yet another petition for post-conviction relief. (Exhibit H.) The State opposed Chaney's request. (Exhibit I.)

Chaney finally filed his amended petition on September 4, 1992. (Exhibit I.) The State responded on November 3, 1992. (Exhbit K.) In December 1992, the District Court acknowledged that briefing was complete and the motion to hold in abeyance would be ruled upon as quickly as possible. (Exhibit L.) In

March 1993, the State again asked for a ruling on the meritsd. (Exhibit M.) The District Court has not responded to the State's request, nor ruled on the merits of the petition.

Arnett v. Lewis, No. CIV-83-2157-PHX-SMM

The Arizona Supreme Court first affirmed Arnett's conviction and death sentence in *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978). Following the attack on the constitutionality of Arizona's death penalty statute, Arnett was resentenced and that sentence was affirmed in *State v. Arnett*, 125 Ariz. 210, 608 P.2d 778 (1980). Arnett filed his federal petition in 1983. (Exhibit B.) Arnett had failed to exhaust some of the issues he raised so while his petition was pending he returned to state court. (Exhibit C.) Arnett filed partial summary judgment motions and in February 1987, the District Court ruled on those motions. The court granted partial relief to Arnett to include another resentencing, and an evidentiary

hearing on the voluntariness of his confession. (Exhibit D.)

On March 6, 1987, the State sought a stay from the District Court because the Arizona Supreme Court has decided to hear Arnett's new state claims on the merits. (Exhibit E.) The District Court granted the stay. (Exhibit A.) In 1988, the Arizona Supreme Court again affirmed the conviction and death sentence in *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988). The State asked the District Court to lift the stay and grant a rehearing. (Exhibit F.) Arnett then asked to amend his petition to include the new issues recently decided by the Arizona Supreme Court. (Exhibit G.) The District Court lifted the stay but denied the State's motion for rehearing. The District Court allowed Arnett to amend his petition. (Exhibit H.)

For 2 years, discovery took place in anticipation of the federal evidentiary hearing on the voluntariness issue. (Exhibit A.) The parties filed

memorandums on the admissibility of the evidence. (Exhibits I, J and K.) In April 1992, Arnett filed a fourth motion for partial summary judgment on his amended petition. (Exhibit L.) The State filed its response on May 13, 1992. (Exhibit M.) The District Court has not ruled on Arnett's motion, nor has it set a date for the evidentiary hearing.

Ceja v. Lewis, No. CIV-84-2322-PHX-RCB

Jose Jesus Ceja is an inmate in the Arizona State Prison sentenced to be executed. On December 14, 1984, Ceja filed a Preliminary Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On December 14, 1984, the District Court of Arizona issued an order staying the scheduled execution of Ceja. (Exhibit C.) On February 28, 1985, Ceja moved to stay the federal proceedings pending the resolution of state post-conviction relief proceedings pending in state court. (Exhibit D.) The State opposed the motion to stay the

proceedings. (Exhibit E.) On March 28, 1985, the District Court granted Ceja's motion to stay the federal proceedings pending the disposition of proceedings in state court. (Exhibit F.)

On November 19, 1986, Ceja filed an Amended Petition for Writ of Habeas Corpus. (Exhibit G.) On May 6, 1987, the State moved to dismiss Ceja's petition for habeas corpus relief. (Exhibit H.) On June 24, 1987, the State replied to Ceja's motion to strike. (Exhibit J.) On October 9, 1987, the District Court denied Ceja's motion to strike, and ordered that Ceja file a response to the State's pending motion to dismiss within 10 days of the Court's order. (Exhibit K.) On November 30, 1987, Ceja filed a response to the State's motion to dismiss. (Exhibit L.) On February 5, 1988, the State replied. (Exhibit M.) On October 18, 1988, the District Court: (1) granted the State's motion to dismiss; (2) directed that the stay of execution would be vacated unless

Ceja filed an amended petition for writ of habeas corpus deleting those claims which the District Court determined were unexhausted; (3) ordered that if Ceja elected to amend his petition by deleting his unexhausted claims, Ceja must at the time of filing his amended petition file a statement showing cause and prejudice regarding the 20 claims which were held to be procedurally barred by the Arizona state courts. (Exhibit N.) On November 1, 1988, Ceja filed a motion to reconsider and vacate the October 18, 1988, order. (Exhibits O and P.) On November 3, 1988, the District Court granted Ceja's motion to stay the enforcement of the October 18, 1988, order. (Exhibit Q.) On November 16, 1988, the State opposed Ceja's motion to reconsider and vacate the October 18, 1988 order. (Exhibit R.)

On December 5, 1988, the District Court held oral argument on Ceja's motion to reconsider and vacate the memorandum and order. The District

Court took the matter under advisement. On May 1, 1989, Ceja filed a motion for partial summary judgment. (Exhibit S.) On May 24, 1989, the State moved to strike Ceja's motion for partial summary judgment. (Exhibit T.)

On July 22, 1989, the District Court ruled on Ceja's motion for reconsideration of the court's October 18, 1988 memorandum and order. The court ruled as follows: (1) denied Ceja's motion for reconsideration concerning issue 3 -- destruction of "gruesome photographs" and issue 4 concerning the jury instruction on malice; (2) granted Ceja's motion for reconsideration concerning issue 8 -- single form of the verdict and issue 12 -- Dr. Karnitschnig's affidavit -- by holding that the District Court could hear those claims on the merits; (3) stayed any further action in the matter pending receipt of the mandate from this Court in *Adamson v. Ricketts*; and (4) ordered the action would not be dismissed and that the stay of

execution would stay in effect until further order of the court. (Exhibit U.)

On November 4, 1991, after the United States Supreme Court decided *Walton v. Arizona*, and *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), the State moved to vacate the District Court's stay of July 22, 1989. (Exhibit V.) On December 18, 1991, the State filed a motion to reconsider the District Court's order of July 22, 1989. (Exhibit W.)

On January 27, 1992, Ceja filed a response to the State's motion for reconsideration. (Exhibit X.) On February 18, 1992, the District Court held oral argument on the State's motion to reconsider. The court indicated that it would rule shortly on the motion, and ordered Ceja to make his final *McCleskey* determination. (Exhibit Y.) On April 30, 1009, Ceja notified the District Court that he was unaware of any other claims. (Exhibit Z.)

On March 12, 1993, the State requested the District Court to rule on its motion for reconsideration. (Exhibit AA.) The District Court has not ruled on the State's request for ruling, or the motion for reconsideration.

ISSUE PRESENTED

Is District Court of Arizona taking "all steps necessary to ensure a "*prompt resolution*" of the capital habeas corpus cases pending before it?

RELIEF REQUESTED

Due to the inexcusable neglect that the District Court of Arizona has exhibited toward Arizona's capital cases, the State requests that this Court establish time periods within which the District Court must rule upon a capital habeas corpus petition, and order the District Court to rule on the present cases within those guidelines or show cause why those judges should not be held in contempt.

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE; A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal courts of appeal may issue a writ of mandamus when it is "necessaary or appropriate in aid of their respective jurisdictions." *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). The United States Supreme Court has long recognized this authority, and stated when it should be used.

> Application for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having

> heard the case, refuses to render judgment or enter a decree in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872).

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957).

The United States Supreme Court stated that it would not tolerate unreasonable delay in a capital case, and such a delay could be the basis of a mandamus petition:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty *to take all steps necessary to ensure a prompt resolution of the matter*, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, ___ U.S. ___, 112 S. Ct. 674, 676, 116 L. Ed. 2d (1992) (emphasis added.) The State of Arizona maintains that the District Court of Arizona has

abused its discretion in the instant cases by not following the dictates of *In re Blodgett* and promptly resolving the matters before it.

In *In re Cement Antitrust Litigation* (*MDL No. 296*), 688 F.2d 1297 (9th Cir. 1982), this Court explained in detail the guidelines it would use to determine whether a mandamus petition was an appropriate remedy in a particular case. The guidelines described are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief they desire; (2) whether the petition will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the District Court's actions are clearly erroneous as a matter of law; (4) whether the claimed error is oft repeated error or "manifests persistent disregard for the federal rules"; and (5) whether the petition raises new and important issues of law of first impression. 688 F.2d at 1301 (citing *Bauman v. United States*

District Court, 557 F.2d 650, 654-55 (9th Cir. 1977)). This Court refers to these five guides as the *Bauman* factors. *Id.* In *In re Cement Antitrust*, this Court noted that related considerations included whether the injury alleged by the petition was not correctable on appeal; whether the petition presents an issue that would repeatedly evade appellate review; or whether "there are other compelling factors relating to the efficient and orderly administration of the district courts." 688 F.2d at 1301. The State believes that, upon review of the *Bauman* guidelines and the related considerations noted in *In re Cement Antitrust*, all indications show that this Court should accept the instant petition and grant the relief requested by the State of Arizona.

A. MANDAMUS IS THE ONLY AVAILABLE MEANS TO ENSURE THE PROMPT RESOLUTION OF THE INSTANT CASE.

The first two *Bauman* guidelines are designed to insure that mandamus is the appropriate remedy. *In re Cement Antitrust*, 688 F.2d at 1301. A petition for

writ of mandamus to a higher court is the appropriate action when a inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calver Fire Ins., 437 U.S. at 661-62 (quoting *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872)); *Ex Parte Newman*, 81 U.S. (14 Wall.) at 165. The State of Arizona has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

Regarding the prejudice facing the State, the United States Supreme Court recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas petition.

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained *severe* prejudice by the *two-and-a-half* year stay of execution. The stay has prevented Washington from

> exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McClesky v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

In Re Blodgett, 112 S. Ct. at 676, 116 L. Ed. 2d at 674 (citation omitted, emphasis added). As with the State of Washington in *Blodgett*, Arizona is suffering a severe diminution of its sovereign power:

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but *the power of a state to pass laws means little if the state cannot enforce them.*

McClesky v. Zant, ___ U.S. ___, 111 S. Ct. 1454, 113 L. Ed. 2d 517, 543 (1991) (emphasis added). The diminution of sovereignty is even greater for the State of Arizona in these cases because the federal courts have prevented the State from enforcing its criminal laws against each of the inmates for considerably longer than the "two-and-a-half" years condemned by the Court in *Blodgett*.

The District Court's apparent endless search for epistemological certainty on the issues before issuing a decision damages the very justice the court seeks:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands . . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McClesky v. Zant, 111 S. Ct. at 1469, 113 L. Ed. 2d at 543 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-53 (1963)). A court immobilized in its search for justice provides none. The District Court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of*

> *jurisdiction which is given, than to usurp that which is not given.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)(emphasis added). Ever-delayed justice is not justice at all.

The State of Arizona has clearly shown that under the first two *Bauman* factors the delay caused by the District Court's failure to rule can only be addressed in a mandamus petition and the State is prejudiced by the District Court's inaction. *In re Cement Antitrust*, 688 F.2d at 1301-02.

B. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA.

The fourth and fifth factors noted in *Bauman* relate to whether the District Court is engaging in oft repeated error, or manifests a persistent disregard of its duty under law.[6] *In re Cement Antitrust*, 688 F.2d at 1303-04. The fourth and fifth factors also deal with whether the District Court's action presents new and important problems, or issues of first impression. *Id.* These factors also weigh in favor of the State in this Court's consideration of whether to accept the State's petition and grant the relief requested.

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6. The State has not discussed the third factor separately because the State is not seeking redress from a District Court order, but form the court's failure to rule. Therefore, the third factor is not directly relevant to the Court's inquiry because the failure or refusal to rule on a case properly before the court is without question the proper subject of a mandamus petition. *Ex Parte Newman.*

The attached chart shows the pervasiveness of the problem the State seeks to redress. Not only are the five selected cases abysmal in and of themselves, but in looking at the attached cases pending in the District Court, it is clear that the District Court of Arizona does not handle capital habeas corpus petitions in an expeditious fashion. Beside *Blazak v. Lewis*, 971 F.2d 1408 (9th Cir. 1992), the District Court had not finally disposed of a first petition in any capital case pending in that court for over 3 years.[7] Such a problem deserves drastic action by this Court.

In deciding whether to issue the supervisory mandamus petition, the Court is faced with an issue of first impression. Not only does the State seek an order from this Court directing the District Court to rule within the time certain on the six cases directly challenged in this mandamus petition; the State also

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7. The 3 years is of particular concern because it has been over 3 years since the United States Supreme Court upheld the Arizona Death Penalty statute in *Walton v. Arizona*.

requests that this Court, in its supervisorial authority, establish time periods within which the District Court must rule in capital habeas corpus petitions and direct the lower court to rule on all motions in all pending capital cases within those time limits. This request is a case of first impression, and is necessary to the orderly administration of justice.

As noted above, generally it is within a court's discretion when to issue an opinion. However, in *Blodgett*, the United State Supreme Court stated that the federal courts had a "duty" in capital cases to "*take all steps necessary to ensure a prompt resolution of the matter.*" 112 S. Ct. at 676, 116 L. Ed. 2d at 676 (emphasis added). Clearly the District Court of Arizona has failed to follow the *Blodgett* mandate. That leaves this Court and the State of Arizona with two options: First, the State may petition, in every capital case pending in the District Court, or those cases to be filed in the future with the District Court,

for a mandamus petition every time the District Court fails to rule promptly on a motion. Such a ruling would require constant inquires by this Court in hundreds of cases. Such a procedure would consume valuable court and attorney time.

The second option is for this Court to order that, in all capital cases pending before the District Court, that court has to rule within specified times on motions once they come at issue. The failure to rule within the time limit would be a prima facia case that the court has not complied with the *Blodgett* mandate, subjecting the lower court to an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case.

The State believes the second alternative is clearly preferable to the first. The *Blodgett* mandate is clear, federal courts must establish procedures and practices to ensure "prompt" resolution of habeas corpus

petitions in capital cases. The District Court of Arizona has failed to do so. This Court must exercise control and establish guidelines that the lower court must obey. Setting time limits for ruling on motions allows the lower court some flexibility, but assures the State that the District Court's current practice of allowing Arizona's capital cases to languish in the District Court for 10 or more years before ruling will cease.

C. THE STATE REQUESTS THAT THIS COURT EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS, AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING.

The State of Arizona believes that it should not take the District Court more than 120 days after a dispositive motion is at issue to rule. Likewise, it should not take the District Court more than 30 days after a procedural motion is at issue to rule on the merits of the motion. The entire state court record is before the court, with record citations and state court opinions. The parties will have briefed the issues citing the relevant cases. These time limits are ample time for the court to rule.

When the District Court determines that an evidentiary hearing is required, the State believes that the hearing should be set within 180 days. One hundred eighty days is more than the speedy trial

provisions of both the state and federal courts. It is baffling to the State why an evidentiary hearing in a collateral proceeding should require more preparation time than the trial.

The District Court of Arizona has failed to promptly resolve these habeas corpus petitions, and it is incumbent that this Court ensure that the mandate in *In re Blodgett* is satisfied. The State believes that establishing these time limits for the District Court to rule on pending capital habeas corpus petitions is not only warranted, but absolutely necessary for the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of Arizona respectfully requests that the Court grant the writ and order the respondent court to render its decision on the dispositive motions within 120 days, or rule on the procedural motions within 30 days. The State further requests that the District Court be

ordered to hold the evidentiary hearing in *Arnett* within 180 days. Furthermore, the State prays that the Court exercise its supervisorial authority and order that the District Court shall rule on all future capital cases within the time limits established, or it will be deemed to be prima facie evidence that an order to show case is warranted.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

Attorney for PETITIONERS

No. 95-420

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*

v.

FRED BERRE DOUGLAS, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

MARK E. OVERLAND*
Overland & Gits
1717 4th Street, 3rd Floor
Santa Monica, CA 90401
(310) 917-5577

MARK A. BORENSTEIN*
KATE SCHNEIDER GOLD
Tuttle & Taylor
A Law Corporation
355 S. Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101
(213) 683-0600
Counsel for Respondent

*Counsel of Record

The Respondent, Fred Berre Douglas, asks leave to file the accompanying Brief in Opposition To Petition for Writ of Habeas Corpus, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed before the California Supreme Court, the United States District Court, and this Court. See Motion for Leave to File In Forma Pauperis, filed by Petitioner Fred Berre Douglas in this Court on January 10, 1994, Case No. 93-7399.

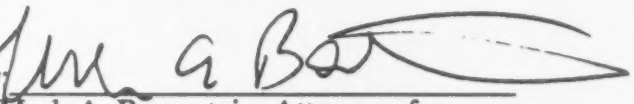
Pursuant to Supreme Court Rule 39.1, no affidavit of poverty is required inasmuch as counsel were appointed pursuant to 18 U.S.C. section 3006A and Rule 26.8.4 of the Local Rules for the Central District of California.[1] 18 U.S.C. §3006A.

Dated: October 9, 1995.

Respectfully submitted,

OVERLAND & GITS
MARK E. OVERLAND

TUTTLE & TAYLOR, A Law Corporation
MARK A. BORENSTEIN
KATE SCHNEIDER GOLD

By 
Mark A. Borenstein, Attorneys for
Fred Berre Douglas, Petitioner

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[1] 18 U.S.C. section 3006A(a) provides in pertinent part that "[e]ach United States district court . . . shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section." Local Rule 26.8.4 provides in pertinent part:

> (a) Appointment of Counsel:
>
> (i) Each indigent petitioner shall be represented by counsel unless petitioner has clearly elected to represent himself . . . A panel of attorneys qualified for appointment in death penalty cases will be certified by a selection board appointed by the Chief Judge of the district.

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Los Angeles, CA 90071-3101
(213) 683-0600
Counsel for Respondent

*Counsel of Record

QUESTION PRESENTED

1. Where the district court consistently has controlled the pace of federal habeas corpus proceedings from their inception, and where the district court has taken several months to consider a habeas petitioner's request for an evidentiary hearing on numerous constitutional claims, has the district court complied with its duty under *In re Blodgett*, 502 U.S. 236, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992) to "take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case," such that a writ of mandate ordering the district court to decide the habeas petition within 120 days is unwarranted?

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No. 95-420

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*

v.

FRED BERRE DOUGLAS, *Respondent.*

Respondent Fred Berre Douglas ("Respondent" or "Mr. Douglas") respectfully requests this Court to deny the petition for writ of certiorari ("Certiorari Petition"), seeking reversal of the Ninth Circuit's denial of a writ of mandate to the district court for the Central District of California and requesting the issuance of a writ of mandate to the district court.

STATEMENT OF THE CASE

Petitioner Warden Calderon seeks a writ of certiorari from this Court, requesting that this Court (1) grant certiorari and issue a writ of mandate to compel the district court to decide Mr. Douglas' federal habeas corpus petition,[1] and (2) adopt time limits for the district courts to render a decision on all pending habeas petitions in capital cases. Certiorari Petition at 20, 24. The Warden's Certiorari Petition is based on the erroneous view that the district

[1]Petitioner also requests that this Court "reverse and remand the Ninth Circuit's denial of mandamus." Certiorari Petition at 24.

court has failed to insure the prompt resolution of this case. From the inception of these proceedings however, the district court rigorously has controlled the pace and the timeliness of the parties' pleadings and briefs, frequently denying Mr. Douglas' requests for extensions of time and, in counsels' view, preventing a full and complete habeas investigation. The district court should not be ordered to accelerate further the pace of these proceedings and thereby further jeopardize the "full and fair consideration" of all the issues, required by *In re Blodgett*, 502 U.S. 236, 240, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992).

On October 4, 1994, Mr. Douglas filed a Request for Evidentiary Hearing on his amended petition for writ of habeas corpus. Petitioner filed his Opposition on October 31, 1994. Mr. Douglas filed his reply on November 14, 1994. The pleadings on the Request consume 140 pages on approximately fifty-six (56) claims. Despite the pendency of Mr. Douglas' Request for Evidentiary Hearing, on or about April 14, 1995, claiming an unreasonable delay, Warden Calderon filed in the district court for the Central District of California, a motion requesting an immediate ruling on Mr. Douglas' Petition for Writ of Habeas Corpus ("Motion To Decide Petition").

The district court denied petitioner's Motion To Decide Petition, rejecting the Warden's description of the procedural history of these proceedings, ruling that this "case has moved along at a steady rate since the beginning," and recognizing its "responsibility to give both parties 'full and fair consideration to all issues presented in the case.' *In re Blodgett*, 502 U.S. 236, 240 (1992)." *See* May 10, 1995 Order, Certiorari Petition, Appendix A at 6. The district court further found the Warden's "claim of a 4-year delay in this case is misleading and

his characterization of the delay as 'unreasonable' is unsupported by the facts." May 10,1995 Order, Certiorari Petition, Appendix A at 6.

The Warden filed a Petition for Writ of Mandate ("Mandate Petition") in the Ninth Circuit on or about June 19, 1995; the Ninth Circuit ordered Mr. Douglas to file a response; Mr. Douglas timely opposed the Mandate Petition. The Ninth Circuit denied the Mandate Petition on August 3, 1995. Certiorari Petition, Appendix B. Based on the procedural history of this case, discussed below, the district court's ruling, and its responsibility to give "full and fair consideration to all issues presented in the case," *In re Blodgett*, 502 U.S. 236, 240 (1992), this Court should deny the Certiorari Petition and decline to issue a writ of mandate to the district court.

Counsel for Mr. Douglas were appointed by the district court for the Central District of California in November 1991. Though the district court granted two extensions of time to enable Mr. Douglas to investigate and prepare a federal habeas petition, on September 15, 1992, the trial court denied Mr. Douglas' third request, stating that "one year is sufficient time to prepare and file a petition for writ of habeas corpus in this case," and that "[n]o further extensions of time will be granted [to file the petition] absent compelling circumstances." *See* September 15, 1992 Order, attached as Appendix A hereto. On September 18, 1992, the district court denied in its entirety Mr. Douglas' request for funds to retain an investigator and mental health experts in order to develop his habeas claims. On November 16, 1992, Mr. Douglas filed his one and only Petition for Writ of Habeas Corpus ("Habeas Petition"). On February 12, 1993, in ruling on the Warden's motion to dismiss the Habeas Petition, the district court, in a detailed 8-page order, found that the Habeas Petition contained claims that it deemed

unexhausted. *See* February 12, 1993 Order, attached as Appendix B hereto. The trial court ruled that it would hold the Habeas Petition in abeyance and maintain the stay of execution for a period of 60 days while Mr. Douglas returned to state court to exhaust those claims that had been found unexhausted.

In April 1993, Mr. Douglas sought a sixty day extension of time to file the state habeas petition; the district court granted an extension of only thirty days. In May 1993, Mr. Douglas sought an additional thirty day extension; the district court granted the request informing Mr. Douglas' counsel that "no further extensions would be granted." *See* June 11, 1993 Order, attached hereto as Appendix C. On June 9, 1993, Mr. Douglas' counsel still required additional time to investigate habeas issues and prepare the state petition, and accordingly, Mr. Douglas requested an additional 60 days in which to file the State petition. The district court denied Mr. Douglas' request, stating that "[i]f petitioner . . . fails to proceed in state court with due diligence, this Court will dismiss the federal case and vacate the stay of execution." *See id.*

Mr. Douglas filed his state Petition for Writ of Habeas Corpus on June 14, 1993 ("State Habeas Petition"). The California Supreme Court requested an informal response on July 16, 1993 and set a greatly accelerated briefing schedule. The Warden filed his brief in opposition to the State Habeas Petition on July 29, 1993, and a letter brief on August 18, 1993. Mr. Douglas responded to the letter brief on August 26, 1993. On October 13, 1993, the State Habeas Petition was denied on the merits.

On January 6, 1994, Mr. Douglas filed a petition for writ of *certiorari* in this Court challenging the constitutionality of California Penal Code sections 190.3. At that time, *Tuilaepa v. California*, 512 U.S. __, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) and *Proctor v. California*, 512 U.S. __, 114 S. Ct. 679, 126 L. Ed. 2d 646 (1994), which had raised substantially identical issues, were pending before this Court. On January 7, 1994, Mr. Douglas sought a stay of the district court proceedings based on the pendency of his petition for writ of *certiorari*. The district court denied Mr. Douglas' request and ordered him to file an amended federal habeas petition no later than January 18, 1994. The court also established a schedule for the filing of the answer and traverse. *See* January 14, 1994 Order, attached hereto as Appendix D.

Mr. Douglas timely filed his Amended Petition for Writ of Habeas Corpus ("Amended Habeas Petition"). The Amended Habeas Petition reasserted the claims that had previously been found unexhausted by the district court. After requesting an extension of time and receiving extra time, Warden Calderon filed an Answer on April 18, 1994. Mr. Douglas filed his Traverse on June 24, 1994. Meanwhile, on June 1, 1994, the lower court denied in its entirety Mr. Douglas' second request for funds to retain an investigator and mental health experts. In or about July 1994, the district court granted in part and denied in part, Mr. Douglas' motion for reconsideration of his request for investigative funds, and at the same time, granted his request for an extension of time to file a request for evidentiary hearing, admonishing Mr. Douglas' counsel regarding the timeliness of the extension request. *See* July 12, 1994 Order, attached hereto as Appendix E. The basis of the request for an extension was, in part, to enable Mr. Douglas to use the investigative funds in order to have any hope of complying with the district court's requirement that the request for an evidentiary hearing

summarize the nature of the evidence to be presented at the hearing. *See* May 10, 1995 Order, Certiorari Petition, Appendix A, at 5, n.1.

The district court established a briefing schedule for the Request for Evidentiary Hearing. *See* July 29, 1994 Order, attached hereto as Appendix F. Mr. Douglas timely filed his Request for Evidentiary Hearing; petitioner filed his opposition on October 31, 1994; Mr. Douglas filed his reply on November 14, 1994. The pleadings on the Request consume 140 pages; the Amended Habeas Petition contains 170 pages, the Answer is 357 pages (including exhibits), and the traverse is another 100 pages. May 10, 1995 Order, Certiorari Petition, Appendix A at 7 n. 3. The trial transcript is approximately 4,000 pages and the entire record consumes thousands of pages more. The guilt phase claims in Mr. Douglas's Request for Evidentiary Hearing involve complex issues of law and fact relating to the adequacy of state hearings resulting in factual determinations, the failure to preserve and disclose exculpatory evidence by the state prosecutor, restriction of cross-examination, the denial of a change of venue motion, the adequacy of the appointment of substitute counsel for Mr. Douglas, representation of Mr. Douglas by ethically conflicted counsel, erroneous instructions to the jury, numerous instances of prosecutorial misconduct, and eighteen instances of ineffective assistance of counsel. The penalty phase claims in the Request for Evidentiary Hearing similarly involve complex legal and factual issues, including nine instances of ineffective assistance of counsel, the exclusion of exculpatory evidence, erroneous instructions to the jury, the erroneous admission of evidence in aggravation, destruction of reporter's notes of a prior relevant proceeding, prosecutorial misconduct, the mental incompetence of Mr. Douglas, the conflict of interest between Mr. Douglas and appellate counsel, and jury misconduct.

REASONS WHY THE PETITION SHOULD BE DENIED

I. MANDAMUS IS NOT A PROPER REMEDY IN THIS CASE.

The All Writs Act, 28 U.S.C. section 1651, does not expand the jurisdiction of this Court. Indeed, the statute itself provides that this Court may issue writs "in aid of [its] jurisdiction[]..." 28 U.S.C. § 1651(a). Supreme Court Rule 20.1 provides:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Mandamus is merely the means "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). This extraordinary remedy therefore exists only where a district court takes some action which it is not empowered to take, or declines to take action which is required of it. A writ of mandate does not reach to those cases in which "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr v. United States*, 351 U.S. 513, 521, 76 S. Ct. 912, 100 L. Ed. 2d 1377 (1956).

Mandamus is a drastic remedy, available only in "exceptional" or "extraordinary circumstances." *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984). Petitioner has the burden of showing that his right to issuance of a writ is "clear and indisputable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288-290, 108 S.Ct. 1133, 99 L.Ed. 2d 296 (1988); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662, 98 S. Ct. 2552, 2557, 57 L. Ed. 2d 504 (1978). Where a matter is committed to the discretion of the district court however, as is the time taken to issue a decision, *see Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970), Petitioner's right to a particular result is not "clear and indisputable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 191, 66 L. Ed. 2d 193 (1980). There must be a demonstrable abuse of discretion or conduct amounting to usurpation of judicial power in order for a writ of mandamus to issue. *Mallard v. United States District Court*, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989).

In arguing that this Court should grant a writ of mandamus, Petitioner relies on *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), in which the Ninth Circuit established standards for issuing such a writ. The Ninth Circuit identified five factors to be considered:

(1) Whether the party seeking mandamus has other adequate means, such as direct appeal, to attain the relief desired;

(2) Whether the Petitioner will be damaged or prejudiced in a way not correctable on appeal;

(3) Whether the district court's order is clearly erroneous as a matter of law;

(4) Whether the district court's order manifests an oft-repeated error or a persistent disregard of federal rules; and

(5) Whether the district court's order raises new or important problems or issues of law of first impression.

Bauman, 557 F.2d at 654-55; *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States District Court*, 459 U.S. 1191 (1983). These factors are cumulative and should be balanced. *Bauman*, 557 F.2d at 655.

Even if this Court applies the standards established by the Ninth Circuit, in this case, where only the first *Bauman* factor has been satisfied, the request for issuance of a writ was properly denied by the Ninth Circuit and should be denied by this Court as well.[2] With respect to the second factor, Petitioner argues that he is prejudiced by the delay in the State's ability to enforce its laws. Certiorari Petition 14-15. However, where, as here, the district court has not refused to rule, but rather, has expressly stated that it will issue a ruling after an appropriate review of the extraordinarily lengthy record has been completed, May 10, 1995 Order, Certiorari Petition Appendix A at 7, Petitioner will not suffer the "severe prejudice" required for issuance of a writ. *See, e.g., Washington Public Utilities Group v. United States District Court*, 843 F.2d 319, 325 (9th Cir. 1987); *see also In re Cement Antitrust Litigation (MDL No. 296)*, 688 F. 2d 1297, 1303 (1982) (delay in proceedings caused by recusal order would not

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[2] Petitioner has failed to mention that the Petition for Writ of Mandamus in *Lewis v. United States District Court for the District of Arizona*, No. 93-70578, Appendix C to Petitioner's Certiorari Petition, was denied by the Ninth Circuit, and, on petition for writ of certiorari, by this Court, as well. *Lewis v. United States District Court for the District of Arizona*, __ U.S. __, 114 S. Ct. 740, 126 L. Ed. 2d 703 (1994).

constitute sufficient injury). Furthermore, with regard to the third *Bauman* factor, the district court's ruling was not "clearly erroneous," as a matter of law, but rather, was supported by a carefully articulated summary of the proceedings to date, and adherence to the mandate of *Blodgett* that the court give "full and fair consideration to all issues presented in the case." 502 U.S. at 240; *see also Washington Public Utilities Group*, 843 F.2d at 325 (A ruling is clearly erroneous only if the Court is left with the "definite and firm conviction that a mistake has been committed.") (citations omitted).[3]

There is no evidence, or even a contention by the Warden, that the district court's ruling manifests an oft-repeated error or its persistent disregard of federal rules. *See Bauman*, 557 F.2d at 654-55. As set forth in the May 10, 1995 Order, the district court has not condoned delay in this case, May 10, 1995 Order, Certiorari Petition Appendix A at 6, has closely controlled proceedings, and, indeed, has denied Mr. Douglas' requests for extensions on several occasions. May 10, 1995 Order, Certiorari Petition Appendix A at 6. Finally, the district court's refusal to issue an immediate ruling on the Amended Habeas Petition (especially where a request for evidentiary hearing is pending) does not present a legal issue of first impression; the district court's denial of Petitioner's motion was based, as it necessarily must be, on the unique facts, circumstances, legal issues, and procedural posture of this case.

This Court should deny the Certiorari Petition requesting that this Court order the district court to rule on the Amended Habeas Petition within 120 days. Petitioner has not

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[3] In his Motion to Decide Petition, Petitioner relied primarily on *In re Blodgett*, an entirely distinguishable case; the district court's denial of the "legally insubstantial motion," May 10, 1995 Order, Certiorari Petition Appendix A at 7, was therefore proper. Mr. Douglas addresses in further detail, below at Section II, the other inapposite legal authority on which Petitioner has relied both in his Motion to Decide Petition and in this Certiorari Petition.

met his burden of showing a "clear and indisputable" right to the requested relief, *see Allied Chem. Corp.*, 449 U.S. at 36, and has failed to demonstrate entitlement to a writ of mandamus under the *Bauman* factors. *See also Gulfstream Aerospace v. Mayacamas Corp.*, 485, U.S. 271, 289 (1988) ("[t]he 'exceptional circumstances amounting to a judicial usurpation of power' will justify issuance of the writ.")

II. NEITHER IN RE BLODGETT NOR THE OTHER AUTHORITY CITED BY PETITIONER SUPPORTS HIS REQUEST FOR A WRIT OF MANDAMUS FROM THIS COURT.

Relying on *In re Blodgett*, 502 U.S. 236 (1992), Certiorari Petition at 8, 14, and other inapposite cases, Petitioner argues that the district court erred in denying his request for an immediate decision on the Amended Habeas Petition. The facts in *Blodgett* and the resulting delay in that case are, however, wholly distinguishable from Mr. Douglas' case.

In *Blodgett*, the State of Washington sought from this Court, by writ of mandamus, an order directing the Court of Appeals to issue its decision on an appeal from the district court's denial of a second federal habeas petition. Unlike the proceedings in this case, the proceedings in *Blodgett* were seemingly protracted. In *Blodgett*, the petitioner filed his first federal habeas petition, and proceedings thereon were completed when the United States Supreme Court denied certiorari. *In re Blodgett*, 116 L. Ed. 2d at 673. The petitioner then filed a second federal habeas petition in the same district court. *Id.* The second habeas petition was denied; petitioner appealed and was granted a stay of execution. A year later, petitioner filed a

motion to withdraw certain issues from consideration by the Ninth Circuit panel. He then filed his third state action for collateral relief, a personal restraint petition, with the Washington Supreme Court. *Id.* He again moved the Court of Appeals to withdraw certain issues from consideration.

After the denial of his third personal restraint petition, the petitioner filed in the Court of Appeals a request to proceed *pro se* and stated his intention to file a third federal habeas petition. *Id.* The Court of Appeals granted the motion to relieve counsel and directed petitioner to file his third petition. At that point, more than two years had passed since the Ninth Circuit had heard oral argument in the case. *Id.* The Washington Attorney General's office then filed the petition for writ of mandamus to compel the Court of Appeals to decide the petition. Though it recognized that "expedited review of [petitioner's] second habeas petition would have been proper," *Blodgett*, 116 L. Ed. 2d at 674, this Court denied the writ of mandamus.

In this case, Mr. Douglas has filed only one federal habeas petition; unlike *Blodgett*, this case does not involve any successive petitions. Furthermore, the Request for Evidentiary Hearing was filed as soon as practicable given the district court's grant of investigative funds. Finally, the Amended Habeas Petition involves numerous complex factual and legal issues. *See* above at 6. Petitioner is, in effect, asking this Court to issue a writ of mandate to the district court which will cause the district court to abandon "its duty to give full and fair consideration to all of the issues presented in the case." *Blodgett*, 116 L. Ed. 2d at 675. *See also Williams v. Calderon*, 52 F. 3d 1465, 1483 (9th Cir. 1995) (Ninth Circuit rejected habeas petitioner's challenge to the 26-month delay in deciding his federal habeas petition since, "[i]n

light of the magnitude of [the] petition and the mortal interests at stake, the district court's delay in [that] case was neither extreme nor unreasonable.")

The other authority cited by the Warden in support of his Certiorari Petition is similarly inapposite. *Phillips v. Vasquez*, 56 F. 3d 1030 (9th Cir. 1995), cited by Petitioner for the proposition that the Ninth Circuit's policy is not to tolerate "extraordinary delay," Certiorari Petition at 9, is distinguishable from the facts of this case. In *Phillips*, the California Supreme Court had affirmed the habeas petitioner's conviction, but reversed his death sentence. Petitioner was then resentenced to death. The automatic appeal of his sentence was still pending though his conviction had been final for approximately ten years. *Id.* at 6705. The district court dismissed Phillips' habeas petition on the grounds of abstention and exhaustion based on the pending state proceedings regarding petitioner's sentence. *Id.*

The Court of Appeals reinstated the habeas petition, expressly stating that its decision in that case was a narrow one. *Phillips*, 56 F. 3d at 1037. "We simply hold that Phillips should not be required to wait more than fifteen years for his sentence to be finally resolved before he may challenge the constitutionality of his conviction." *Id.* This Court found that Phillips' right to reasonably prompt constitutional scrutiny of his sentence outweighed any existing jurisprudential concerns. *Id.* at 6706. Neither the narrow holding in *Phillips*, nor its result, nor its underlying concerns for the habeas petitioner's right to challenge the constitutionality of his sentence supports granting the Warden's Certiorari Petition and request for a writ of mandate in this case.[4]

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[4] *Steffen v. Tate*, 39 F.3d 622 (6th Cir. 1994), cited by Petitioner, Certiorari Petition at 16, 17, is similarly unpersuasive. In *Steffen*, the Sixth Circuit dissolved the stay of execution where

In this case, the district court's statement that it will issue a ruling when it has completed its review complies with *Blodgett's* mandate to give "full and fair consideration to all of the issues presented in the case." *In re Blodgett*, 116 L. Ed. 2d at 675. The district court's order is not "clearly erroneous." Based on the facts and circumstances of this case, and on *In re Blogett*, this Court cannot have the "definite and firm conviction that a mistake has been committed," *Washington Public Utilities Group v. United States District Court*, 843 F.2d 319, 325 (9th Cir. 1987) or that there are "exceptional circumstances amounting to a judicial usurpation of power." *Gulfstream v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). There is no necessity to compel the district court to discharge authority which it is refusing to exercise. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943).

III. PETITIONER'S UNPRECEDENTED REQUEST THAT THIS COURT EXERCISE ITS SUPERVISORY AUTHORITY TO ESTABLISH A RULE GOVERNING ALL HABEAS CORPUS PETITIONS SHOULD BE REJECTED.

Petitioner requests that this Court exercise it supervisory authority and establish a 120-day limit from the time of the filing of the Answer for all district courts to decide petitions for habeas corpus. Certiorari Petition at 20. This unprecedented and dangerous demand, applicable to cases not before this Court, would subvert the drastic and extraordinary nature of mandamus remedy.

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the district court had granted the stay though no habeas petition had been filed. Accordingly, the Court's discussion of delay focused on the petitioner's failure to file a habeas petition. *Id.* at 627-28. *In re Parker*, 49 F.3d 204 (6th Cir. 1995), similarly involved the erroneous grant of a stay of execution where no habeas petition had yet been filed. In contrast, Mr. Douglas' Amended Habeas Petition was timely filed, as was his Request for an Evidentiary Hearing.

The issuance of the "extraordinary remedy" of the writ of mandamus is justified only when it is clear that "exceptional circumstances amounting to a judicial 'usurpation of power'" exist. *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967). Unless the record before the court clearly establishes such circumstances, mandamus cannot issue. *See Will v. United States*, 389 U.S. at 105 (issuance of mandamus by Court of Appeals reversed because record did not establish that district court adopted a deliberate policy of violating federal rules or that disclosure of identity of witnesses would involve risk of harm or otherwise prejudice the government's case; "We do not know what [the district court] ordered the Government to reveal under what circumstances in other cases.")

As illustrated by the different facts, legal issues, and procedural postures of *In re Blodgett, Phillips v. Vasquez*, 56 F. 3d 1030 (9th Cir. 1995), and this case, *see* above at section II, federal habeas proceedings in capital cases cannot proceed in any generalized uniform manner or time frame. Petitioner's request that this Court establish a blanket 120 day time limit for ruling on all habeas petitions therefore defies logic and common sense. The proposed rule is particularly inappropriate where, as here, a request for an evidentiary hearing is pending.[5] This Court's use of supervisory authority is better suited to those issues capable of general resolution without regard to specific underlying facts. *See, e.g.*, 9 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 110.28, at 352 (2d Ed. 1995) ("To the extent that discovery practices present questions of law capable of general resolution, supervisory mandamus would seem to be the ideal solution.") (Footnote omitted.) Establishment of arbitrary time limits within which a

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[5] In *Siripongs v. Calderon*, 35 F.3d 1308, 1315 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1175 (1995), the Ninth Circuit held that where a petitioner has made out a colorable claim of ineffective assistance of counsel, it is "generally likely" that an evidentiary hearing will be required. Mr. Douglas's pending Request for Evidentiary hearing involves multiple claims of ineffective assistance of counsel.

district court must rule on the habeas petition in this case or in other pending cases without taking into account the unique facts, legal issues, or procedural postures of each individual case would interfere with the duty of district courts to carefully consider matters before them and would constitute an improper use of this Court's supervisorial power.

CONCLUSION

For these reasons, the Certiorari Petition and request for writ of mandate to the Central District of California should be denied.

Dated: October 9, 1995

Respectfully submitted,

OVERLAND & GITS
MARK OVERLAND

TUTTLE & TAYLOR, A Law Corporation
MARK A. BORENSTEIN
KATE SCHNEIDER GOLD

By _____
Mark A. Borenstein, Attorneys
for Respondent Fred Berre Douglas

92313

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	Case No. CV 91-3055-RSWL ORDER RE: PETITIONER'S MOTION TO EXTEND THE STAY OF EXECUTION AND TO EXTEND THE TIME FOR FILING A PETITION FOR WRIT OF HABEAS CORPUS

This Court is of the opinion that one year is sufficient time to prepare and file a petition for writ of habeas corpus in this case. Accordingly, the petition is due no later than November 16, 1992. The stay of execution is extended until November 20, 1992. No further extensions of time will be granted absent compelling circumstances.

IT IS SO ORDERED.

Dated: September 15, 1992

RONALD S. W. LEW

RONALD S. W. LEW
United States District Judge

APPENDIX B

FILED
FEB 12 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	Case No. CV 91-3055-RSWL ORDER RE: RESPONDENT'S MOTION TO DISMISS THE PETITION

The Court has read respondent's motion to dismiss the petition and all pleadings filed in response to that motion. The Court has also considered the arguments made by both parties at the hearing held on February 8, 1993. In addition, the Court has reviewed those portions of the state record relevant to the issues raised in respondent's motion. Having considered all of the items discussed above, the Court finds that the petition filed on November 16, 1992 contains a number of unexhausted claims.

LAW ON EXHAUSTION

For a federal court to review a state prisoner's claim of constitutional error, the error must have been "fairly presented

to the state courts." Picard v. Connor, 404 U.S. 270, 275 (1977). "A claim is fairly presented if the petitioner has described the operative facts and legal theory on which his claim is based." Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986).

THE UNEXHAUSTED CLAIMS

Before discussing the ramifications of having unexhausted claims, the Court will briefly discuss each unexhausted claim. First, petitioner concedes that guilt phase claims 22(a), 22(b), 22(c), and 23 and penalty phase claims 1(a), 1(c), 1(e), 1(f), 1(g), 3, 4, and 16 are unexhausted and the Court accepts that those issues are unexhausted.

Petitioner's guilt phase claim 7 states that the prosecution withheld evidence of promises and inducements made to key witness, Hernandez. This claim relates to drug charges pending against Hernandez at the time he testified against petitioner. Petitioner argues that this issue is exhausted because petitioner, in a pro per state habeas petition, requested that he be provided with the final court decision relating to the pending narcotics charges against Hernandez. Even construing the pro per petition liberally, petitioner's request did not put the state court on notice of the legal and factual bases of his prosecutorial withholding claim. Therefore, this claim is UNEXHAUSTED.

Petitioner's guilt phase claim 24 alleges nine different instances of ineffective assistance of counsel at the guilt phase. Petitioner argues that this claim is exhausted by virtue of petitioner's pro per petition for rehearing filed April 21,

1990. A review of that petition reveals an inadequate basis for finding that the state court was apprised of the factual and legal bases of the ineffective assistance of counsel claim. Certainly petitioner let the state court know he was dissatisfied with his trial attorney. Nevertheless, the specific factual and legal contentions raised in claim 24 have never been presented to the state court. Accordingly, this issue is **UNEXHAUSTED**.

Petitioner's penalty phase claim 1(b) argues that trial counsel was ineffective for failing to protect petitioner from prejudicial pre-trial publicity. Petitioner submits that the factual basis for the claim has been presented to the state court, but admits that the legal claim presented to the state court focused on the right to a fair trial, not the right to the effective assistance of counsel. For exhaustion, the state court must be given the operative facts and the legal theory. The legal theory behind pretrial publicity affecting the right to a fair trial is different than the legal theory behind attorney error for failing to protect petitioner from pretrial publicity. Therefore, this issue is **UNEXHAUSTED**.

Petitioner's penalty phase claim 10 raises six incidents of prosecutorial misconduct. In particular, claim 10(d) argues that the prosecutor mentioned the time and place of petitioner's arrest, facts not in evidence. Claim 10(e) argues that the prosecutor referred to petitioner's interest in pornography and sexual psychopathy, facts not in evidence. Petitioner contends that even though those specific acts were not presented to the state court, the "substance of the claim" was presented. The focal point of petitioner's argument in his opening brief was the

prosecutor's alleged misstatements of law surrounding the application of the statutory factors. Nowhere in the discussion in the opening brief was there a discussion of factually inappropriate argument. Accordingly, **claims 10(d) and 10(e) are UNEXHAUSTED.**

To summarize, the Court finds that the following claims are unexhausted:

GUILT PHASE - 7, 22(a), 22(b), 22(c), 23, 24;

PENALTY PHASE - 1(a), 1(b), 1(c), 1(e), 1(f), 1(g), 3, 4, 10(d), 10(e), 16.

THE EXHAUSTED CLAIMS

The Court did find that some of the issues deemed by respondent to be unexhausted were, in fact, exhausted. For purposes of completeness, the Court briefly summarizes those findings.

Petitioner's **guilt phase claim 4** states that the grant of immunity to Hernandez deprived him of due process because, under the terms of the immunity, Hernandez had to repeat the same story he told the Mexican authorities or face prosecution. Petitioner's opening brief on appeal, particularly pages 138-146, sufficiently sets forth the factual and legal bases of the federal claim. Accordingly, this claim is **EXHAUSTED.**

Petitioner's **guilt phase claim 6** states that petitioner was deprived of due process and ineffective assistance of counsel during the guilt phase deliberations. The jury asked to rehear the testimony of five witnesses. The court reporter read the testimony of four of the witnesses without petitioner or his counsel being present in the jury deliberation room. Petitioner

never waived his presence. Respondent argues that petitioner never raised the part about his personal waiver being needed. However, in his opening brief (pages 248-251), petitioner clearly argued that he did not, and legally could not, waive his presence at the rereading of testimony. Thus, this issue is **EXHAUSTED.**

Petitioner's guilt phase claim 10 states that petitioner was denied the effective assistance of counsel when the court denied his motion for appointment of counsel to assist him with a Marsden motion/hearing. In particular, claim 10(h) argues that if petitioner had had the assistance of new counsel, new counsel would have discovered that this was trial counsel's first capital case, that he previously worked as a deputy district attorney in Orange County, and that trial counsel was personally acquainted with the prosecutor who handled petitioner's 1977 case. Respondent argues that while the Marsden/denial of counsel issue was presented to the state court, the factual claims regarding what counsel would have discovered have never been presented to the state court. Petitioner argues that this additional factual information did not significantly change the issue from the way it was presented to the state court. Indeed, as petitioner notes, newly discovered evidence does not defeat exhaustion unless it places the case "in a significantly different and stronger evidentiary posture than it was when the state courts considered it." Aiken v. Spalding, 841 F.2d 881, 883 (9th Cir. 1988), quoting, Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983). Thus, this issue is **EXHAUSTED.**[1/]

[1/] Respondent suggests in a footnote that to the extent claim 11 incorporated the arguments of claim 10, claim 11 was similarly unexhausted. Since claim 10 is exhausted, claim 11 is also

Petitioner's **guilt phase claim 12** states that petitioner was denied effective assistance of counsel because his trial counsel had a conflict of interest due to his previous employment as a prosecutor for the Orange County District Attorney. Respondent submits that this factual facet of petitioner's conflict of interest claim was never presented in state court. Petitioner argues that petitioner exhausted this issue in his pro per petition for rehearing filed April 21, 1990. Petitioner's pro per petition does indeed argue that trial counsel had a conflict due to his previous position as a deputy district attorney. This fact, along with the fact that petitioner raised a host of other conflict of interest claims against his trial counsel, mandates a finding that this issue is **EXHAUSTED.**

Petitioner's **penalty phase claim 1(d)** alleges ineffective assistance of counsel for failing to object to prosecutorial misconduct during closing argument to the penalty phase jury. Petitioner correctly notes that this failure to object claim was raised in his opening brief on appeal (pages 394-397). Thus, this sub-issue is **EXHAUSTED.**

Petitioner's **penalty phase claim 13** states that appellate counsel's contentious relationship with petitioner created a conflict of interest that deprived petitioner of the ineffective assistance of counsel. Petitioner is correct that his numerous pro per state habeas petitions raised this claim. As such, this issue is **EXHAUSTED.**

EXHAUSTED.

In summary, the Court finds that the following contested issues are exhausted:

Guilt Phase - 4, 6, 10(h), 11, 12;

Penalty Phase - 1(d), 13.

EFFECT OF HAVING UNEXHAUSTED CLAIMS

The United States Supreme Court has made clear that federal courts cannot hear habeas petitions containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509 (1982). When a district court is faced with a mixed petition, the court must give petitioner the choice of either returning to state court to exhaust the unexhausted claims or refiling the petition with only the exhausted claims. Id.

Petitioner suggests that the special circumstances of his case allow this Court to disregard the unexhausted nature of the claims and proceed to rule on the merits of the petition. Specifically, petitioner argues that the state deprived him of the effective assistance of counsel at the appellate stage by repeatedly ignoring his requests for new counsel. As a result, petitioner's appellate counsel failed to file a state habeas petition, the vehicle through which petitioner would have exhausted his unexhausted claims. Petitioner contends that the state was responsible for his failure to exhaust; therefore, he should not be forced to return to state court now.

While this argument is fairly ingenious, it does not serve to defeat the exhaustion requirement. Petitioner has no constitutional right to counsel for post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 558-559 (1987); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (specifying that there is no

constitutional right to counsel for state post-conviction proceedings even for death row inmates). In this case, petitioner filed a number of pro per state habeas petitions, thus demonstrating that he had access to the state courts for habeas review. Petitioner's failure to raise all of the claims now presented by federal habeas counsel does not require this Court to ignore the exhaustion requirement set forth in Rose v. Lundy.

Because this Court cannot entertain a habeas petition containing both exhausted and unexhausted claims, and because petitioner has elected to return to state court to exhaust his unexhausted claims, this Court orders petitioner to file a state habeas petition containing his unexhausted claims in the California Supreme Court within 60 days from the date of this Order. Petitioner is to lodge with this Court a copy of the state habeas petition. In addition, petitioner is ordered to file a status report every 30 days (counting from the date the state habeas petition is filed) apprising this Court of the status of the state case.

During the next 60 days, and during the pendency of the state litigation, this Court will hold the federal proceedings in abeyance and keep the stay of execution in place. However, if petitioner fails to file a state habeas petition within 60 days, the Court will dismiss the federal case and vacate the stay of execution (unless petitioner files an amended petition containing only exhausted claims within the 60 days).

IT IS SO ORDERED.

DATED: February 2, 1993

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED 2/10/93

Helene G. Frazon
DEPUTY CLERK

APPENDIX C

FILED
JUN 11 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	Case No. CV 91-3055-RSWL ORDER RE: EX PARTE APPLICATION FOR EXTENSION OF TIME TO FILE STATE HABEAS PETITION

The Court has read and considered petitioner's ex parte application for a sixty-day extension of time to file his state habeas, as well as the supporting declaration. That request is DENIED.

Counsel for petitioner were appointed on November 6, 1991, over 19 months ago. The Court allowed petitioner 12 months, until November 16, 1992, to file his petition. On February 12, 1993, the Court found that the petition contained unexhausted claims. The Court held the federal proceedings in abeyance and gave petitioner sixty-days to file a petition in the state court and begin the exhaustion process.

In April 1993, petitioner sought a sixty-day continuance. The Court granted a thirty-day continuance and stated that no further

continuances would be granted.

In May 1993, petitioner sought another 30-day extension. The Court granted that motion. The Court's clerk telephonically informed petitioner's counsel that no further extensions would be granted.

On June 9, 1993, petitioner filed the instant motion seeking yet another sixty-day extension of time to file the state habeas petition. Petitioner continues to assert the same grounds that he has been asserting for the past two requests: he is continuing to investigate and discover new claims.

This Court finds that petitioner has had sufficient time to investigate this case. Moreover, petitioner has been on notice for the past two months that the Court is not inclined to grant further continuances.

Accordingly, the Court orders petitioner to file a state habeas petition with the California Supreme Court no later than June 21, 1993. If petitioner fails to comply with this Order, or fails to proceed in state court with due diligence, this Court will dismiss the federal case and vacate the stay of execution.[1/]

IT IS SO ORDERED.

DATED: June 11, 1993

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED 6/11/93

DEPUTY CLERK

[1/] Alternatively, petitioner may file a petition in this Court containing only exhausted claims, no later than June 21, 1993.

APPENDIX D

ENTERED
CLERK, U.S. DISTRICT COURT
JAN 14 1994
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

1 1 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden of San Quentin State Prison Respondent.	No. CV 91-3055-RSWL ORDER DENYING PETITIONER'S APPLICATION FOR A STAY OF PROCEEDINGS PENDING A DECISION ON PETITION FOR WRIT OF CERTIORARI **DEATH PENALTY CASE**

The Court has read and considered petitioner's ex parte application for a stay of proceedings pending a decision on petition for writ of certiorari to the United States Supreme Court, as well as respondent's opposition filed prior to the filing of petitioner's application. The Court DENIES the application finding that no legal reason exists for staying the proceedings in federal court.

BACKGROUND

In February 1993, the Court found that the petition previously filed in this case contained unexhausted claims. The Court held the federal proceedings in abeyance while petitioner returned to state court to exhaust his state remedies. In October 1993, the California Supreme Court denied petitioner's state habeas petition on the merits. On

November 18, 1993, following a request from the Court, the parties agreed to a briefing schedule for filing petitioner's amended petition, the answer, and the traverse. According to the schedule, which was signed by the Court on November 19, 1993, petitioner's amended petition was due on January 10, 1994.

On January 7, 1994, petitioner sought a stay of the proceedings in this Court, including a stay of the filing of his amended petition, because he filed a petition for writ of certiorari in the United States Supreme Court on January 6, 1994.

DISCUSSION

The Court finds that the filing of a petition for writ of certiorari does not impact on the proceedings in this Court. The Court held these proceedings in abeyance pending exhaustion. Exhaustion has been completed. Exhaustion requires a claim to be presented to the state courts. See Picard v. Connor, 404 U.S. 270, 278 (1971). Because the United States Supreme Court is not a state court, petitioning for certiorari is not a necessary component of exhaustion and is not required before a prisoner petitions for a writ of habeas corpus in federal court. See Fay v. Noia, 372 U.S. 391, 436 (1963); Ulster County Court v. Allen, 442 U.S. 140, 149 n.7 (1979). Accordingly, petitioner has cured the legal impediment that prevented him from proceeding in this Court.

The Court understands that the United States Supreme Court has granted certiorari on a claim that calls into question the constitutionality of part of California's death penalty statute. Nevertheless, the Court will not stay proceedings in this Court while maintaining a stay of execution pending a ruling by the United States Supreme Court because there exists no legal reason why petitioner cannot

move forward with his federal petition.

CONCLUSION

Petitioner's application to stay proceedings is DENIED. Petitioner must file his amended petition no later than January 18, 1994. The answer will be due on March 18, 1994, and the traverse will be due on April 19, 1994.

IT IS SO ORDERED.

Dated: January 11, 1994

Ronald S. W. Lew
United States District Judge

APPENDIX E

FILED
JUL 12 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. ARTHUR CALDERON, Warden of San Quentin State Prison Respondent.	No. CV 91-3055-RSWL **DEATH PENALTY CASE** ORDER RE: PETITIONER'S EX PARTE APPLICATION TO EXTEND TIME FOR FILING THE MOTION FOR AN EVIDENTIARY HEARING

The Court GRANTS petitioner's motion to extend time for filing the motion for an evidentiary hearing. The Court will notify the parties of the deadline for filing the motion at the time it rules on petitioner's pending second amended application for funds for experts and an investigator.

The Court notes the petitioner has fallen into the habit of filing requests for extensions of time on the day of or one day prior to the date a filing is due. Petitioner is to make every effort to file requests for continuances as early as possible. The Court will no

longer entertain last-minute requests for additional time unless extraordinary circumstances prevented petitioner from making his request in a timely manner.

IT IS SO ORDERED.

Dated: July 12, 1994

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 7/12/94

DEPUTY CLERK

APPENDIX F

FILED

JUL 29 1994

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. ARTHUR CALDERON, Warden of San Quentin State Prison Respondent.	No. CV 91-3055-RSWL DEATH PENALTY CASE ORDER RE: BRIEFING SCHEDULE FOR PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

Petitioner's Motion for an Evidentiary Hearing is to be filed no later than October 3, 1994. The motion is to include all legal points and authorities that support petitioner's claim(s) for relief, or specific page references to the points and authorities presented in previously filed pleadings.

Opposition to the motion is to be filed no later than October 31, 1994.

Any reply to the opposition must be filed no later than November 14, 1994.

The Court will take the motion under submission and will notify the parties if and when a hearing on the motion will be held.

IT IS SO ORDERED.

Dated: July 29, 1994

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge